Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM 1978

No. 78-485

TEXAS COMMITTEE ON NATURAL RESOURCES,
Petitioner,

v.

BOB BERGLAND, SECRETARY OF AGRICULTURE OF THE UNITED STATES, ET AL.,
Respondents.

REPLY TO MEMORANDUM FOR THE RESPONDENT

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Time limitation for filing the petition for writ of certiorari is not jurisdictional. *Durham v. U.S.* 401 U.S. 481, (1971); *Taglianetti v. U.S.*, 394 U.S. 316 (1969).

Petitioner mailed this petition at the Post Office, Dallas, first-class, airmail, insured on the morning of September 16, only 86 days after the overruling of petition for rehearing in the Court of Appeals, as attested by the attached photocopy of Receipt No. 925652 (Exhibit No. 1).

Under Rule 25, Federal Rules of Appellate Procedure, the mailing would have constituted timely filing. Although the

Supreme Court has no such mailing rule, petitioner requests the Court, in its discretion, to accept the timely mailing as a filing of the petition.

The one-day delay by the Postal Service does not seem to interfere with the "just and speedy determination" of this action. On the other hand, the denial of this petition on account of this one-day lateness would deny the "just" and "inexpensive determination" of an extremely important issue. (See Rule 1, Federal Rules of Civil Procedure).

The Respondent has cited only one case: *Toledo Scale Co. v. Computing Scale Co.*, 261 U.S. 399, 417-418 (1923). In that case, the decree of the Court of Appeals had been entered in October, 1921, and the Supreme Court, on January 9, 1922, had denied a petition for writ of certiorari. On May 22, 1922, a second petition for writ of certiorari was filed. This is an entirely different situation from the instant case.

Moreover, the statute then applicable has been changed considerably through the years since then, including the addition of a provision for extension of not exceeding sixty days by a Justice of the Supreme Court. Since the petition in the instant case was docketed only one day late, we must turn next to the rules. Rule 22(1), (2) and (3) Supreme Court, uses the language, "shall be deemed in time." The verb, "deem", involves the exercise of reasoning by the Supreme Court, rather than jurisdictional deadline.

Similarly, Rule 25(a), Federal Rules of Appellate Procedure, uses this language"

> ". . . except that briefs and appendices *shall be deemed filed* on the day of mailing is the most expeditious form of delivery by mail, excepting special delivery, is utilized." (emphasis supplied).

The use of this language in the Rule, which is based on 28 U.S.C. 2101, demonstrates a recognition that the Court should and does have to determine exceptions to deadlines in applying for review of lower court decisions.

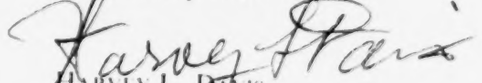
28 U.S.C. 2101(c) uses the phrase ". . . shall be taken or applied for. . . ." This language also leaves discretion in the Court as to the method by which a petition shall be deemed to be applied for. The Supreme Court can deem this petition filed when mailed, just as the Courts of Appeals can and do.

Rule 34(2) of the Supreme Court addresses the situation of a party requesting a time extension before the regular deadline expires. Petitioner had no reason to use this rule. Petitioner in good faith believed mailing the petition four days prior to the 90 day period afforded ample time for the petition to be timely filed. Personally carrying the Petition from Dallas to Washington did not appear logical, would have been costly as well as an additional consumption of the energy resources of this Nation.

The Supreme Court rules do not address the instant situation where a petition was mailed in advance but was not delivered within the normal time. In the instant situation, Petitioner requests the Court, and each Justice therein, either to deem the petition as timely, or to accept it although not timely, or to grant a one-day extension so that it will be deemed timely.

Respondents have delayed for more than a month, their raising the question of timely filing of the Petition. It would appear any rights they may have had to raise the question have been waived.

Respectfully submitted,



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925652

RECEIPT FOR INSURED MAIL
DOMESTIC—INTERNATIONAL

ADDRESSED FOR DELIVERY AT
(Post Office, State and Country)

Washington DC.
20543

POSTAGE	AIR ☒	$ 10.90
INSURANCE COVERAGE		FEE
$ 400 cc		$ 2.75
SPEC. HANDLING		¢
DOMESTIC ONLY — SPECIAL DELIVERY		$
DOMESTIC ONLY — RESTRICTED DELIVERY		¢
RETURN RECEIPT (Except to Canada)		45¢
FRAGILE ☐ LIQUID ☐ PERISHABLE ☐	TOTAL	$14.10
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2. ARTICLE ADDRESSED TO:

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REGISTERED NO.	CERTIFIED NO.	INSURED NO.
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SIGNATURE ☐ Addressee ☐ Authorized agent
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SUPREME COURT, U.S.

EXHIBIT I